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Omega Construction Services, LLC and Roy Evaimalo. Case 28–CA–188536

May 12, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent failed to file an answer to the complaint. Upon a charge and amended charge filed by Roy Evaimalo on November 18 and November 30, 2016, respectively, the General Counsel issued a complaint and notice of hearing on January 31, 2017, against Omega Construction Services, LLC (the Respondent), alleging that it has violated Section 8(a)(1) of the Act. The Respondent failed to file an answer.

On March 9, 2017, the General Counsel filed with the National Labor Relations Board motions to transfer and continue matter before the Board and for default judgment. Thereafter, on March 15, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

On the entire record, the National Labor Relations Board makes the following

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received by February 14, 2017, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated February 16, 2017, advised the Respondent that unless an answer was received by February 21, 2017, a motion for default judgment may be filed. In addition, on February 27, 2017, the Region issued another letter to the Respondent, informing it that the Region will file a motion for default judgment with the Board if the Respondent failed to file an answer by March 6, 2017. Nevertheless, the Respondent failed to file an answer.¹

¹ The uncontradicted assertions in the motion for default judgment indicate that the Region used various means to communicate with the

In the absence of good cause being shown for the failure to file an answer, we deem the allegations of the consolidated complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Tucson, Arizona (Respondent's facility), and has been a contractor in the construction industry doing multifamily residential, commercial, and industrial construction and repair.

During the 12-month period ending November 18, 2016, the Respondent in conducting its operations described above, performed services valued in excess of \$50,000 in States other than the State of Arizona, and purchased and received at the Respondent's facility

Respondent, including regular and certified mail, UPS delivery, email, and telephone. After the copy of the charge was returned to the Regional Office, a Board agent called the Respondent's owner, Danny Lee Anderson, Jr. requesting the Respondent's current mailing address. Anderson provided an email address and stated that he would provide an updated mailing address the next day, representing that the Respondent was locked out of its facility. The Board agent then sent copies of the charge and amended charge to Anderson at his email address, and Anderson subsequently corresponded with Board agents using his email address. Anderson later informed a Board agent that he was willing to accept service of documents at his personal address. Copies of the charge and amended charge were then sent by regular mail to the Respondent at the personal address provided by Anderson. There is no indication that these documents were returned by the Postal Service. A copy of the complaint was sent by certified mail to the Respondent at Anderson's address, but no authorized recipient was available. Notice was left that the document was available for pickup, but after the holding time had expired, the document was returned unclaimed to the Board's Las Vegas Resident Office. The February 16 and February 27, 2017 reminder letters, with attached copies of the complaint, were served on the Respondent at Anderson's address by UPS delivery, and tracking information indicates they were delivered. In addition, the February 27, 2017 reminder letter with an attached copy of the complaint was sent to Anderson at his email address, and the General Counsel received a read receipt showing that the email had been read. The motion for default judgment was also sent to Anderson at that email address. It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003). Further, the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Id.*; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), *enfd. sub nom. NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988). In any event, the undisputed assertions in the General Counsel's motion indicate that UPS delivered the reminder letters and attached complaints to Anderson's personal address and the Respondent also received the February 27, 2017 reminder letter and attached copy of the complaint by email.

goods valued in excess of \$50,000 directly from points outside the State of Arizona.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals have held the positions opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Daniel Anderson, Jr.	Owner
Riley (Last Name Unknown)	Supervisor

The following events occurred, giving rise to this proceeding.

1. From about September 1, 2016, to about October 18, 2016, the Respondent's employee Roy Evaimalo engaged in concerted activities with other employees for the purposes of mutual aid and protection, and concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees, by talking to other employees about, and concertedly raising concerns to the Respondent about, wages, hours, and working conditions, including unpaid wages.

2. About September 3, 2016, the Respondent, by Daniel Anderson, Jr. (Anderson), at the Tanglewood Apartments jobsite in Tucson, Arizona (the Tanglewood jobsite):

(a) interrogated its employees about their concerted activities; and

(b) by referring to its employees' discussions with other employees about their terms and conditions of employment, without disclosing how it learned of those activities, created an impression among its employees that their concerted activities were under surveillance by the Respondent.

3. About October 7, 2016, the Respondent, by Anderson, by telephone:

(a) promulgated an overly-broad and discriminatory rule or directive prohibiting its employees from "running their mouths"; and

(b) threatened to suspend its employees or cease assigning them work because they engaged in concerted activities.

4. About October 7, 2016, the Respondent suspended Evaimalo and ceased assigning him work.

5. About October 12, 2016, the Respondent, by Anderson, by text message:

(a) re-promulgated the overly-broad rule or directive described above;

(b) threatened to suspend its employees or cease scheduling them to work because they engaged in concerted activities; and

(c) threatened not to assign future work to its employees unless they ceased engaging in concerted activities.

6. About October 12, 2016, the Respondent conditioned the assignment of future work to Evaimalo on his cessation of the activities described above.

7. About October 18, 2016, the Respondent, by Anderson, at the Tanglewood jobsite:

(a) interrogated its employees about their concerted activities; and

(b) threatened its employees with unspecified reprisals for engaging in concerted activities.

8. About October 18, 2016, the Respondent, by Anderson, at the La Quinta Apartments jobsite in Tucson, Arizona:

(a) threatened its employees with discharge for engaging in concerted activities;

(b) threatened its employees with discharge for failing and refusing to disclose that they engaged in concerted activities in response to the interrogation described above in paragraph 7(a); and

(c) promulgated an overly-broad and discriminatory rule or directive prohibiting its employees from communicating with third parties about their terms and conditions of employment.

9. About October 18, 2016, the Respondent:

(a) discharged Evaimalo;

(b) reneged on an agreement to allow Evaimalo to purchase a work truck for which he had already paid \$2000 toward the agreed-upon purchase price, and failed to reimburse him for the amount already paid; and

(c) failed to return to Evaimalo personal belongings, tools, and property that were left in his work truck at the time of his discharge.

10. The Respondent engaged in the conduct described above in paragraphs 4, 6, and 9 because Evaimalo engaged in the conduct described above in paragraph 1, and to discourage employees from engaging in these or other concerted activities.

11. The Respondent engaged in the conduct described above in paragraphs 4, 6, and 9 because Evaimalo violat-

ed the rule described above in paragraph 3(a) and 5(a), and to discourage employees from engaging in these or other concerted activities.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by refusing to assign Roy Evaimalo work and suspending and discharging him, we shall order the Respondent to offer Evaimalo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. In addition, we shall order the Respondent to make Evaimalo whole for any loss of earnings and other benefits suffered as a result of the unlawful actions against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate Evaimalo for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.² Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.³

² For the reasons stated in his separate opinion in *King Soopers*, 364 NLRB No. 93, slip op. at 9–16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

³ The General Counsel additionally seeks a make-whole remedy that includes reasonable consequential damages incurred as a result of the Respondent's unfair labor practices. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Guy Brewer 43 Inc. d/b/a Checkers*, 363 NLRB No. 173, slip op. at 2 fn. 2

Further, having found that the Respondent violated Section 8(a)(1) by reneging on an agreement to allow Evaimalo to purchase a work truck for which he had already paid \$2000 toward the agreed-upon purchase price and failing to reimburse him for the amount already paid, we shall order the Respondent, at Evaimalo's option, to either reinstate the purchase agreement or reimburse Evaimalo for the \$2000 that he already paid toward the purchase price, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Having found that the Respondent violated Section 8(a)(1) by failing to return Evaimalo's personal belongings, tools, and property that were left in his work truck at the time of his discharge, we shall order the Respondent to return those belongings to Evaimalo or to reimburse Evaimalo for the cost of replacing those belongings, with interest as prescribed above.

The Respondent additionally shall be ordered to remove from its files any references to the refusal to assign Evaimalo work, his unlawful suspension, and his discharge and to notify him in writing that this has been done and that the unlawful actions will not be used against him in any way. We shall further order the Respondent to compensate Evaimalo for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 28 a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Omega Construction Services, LLC, Tucson, Arizona, its officers, agents, successors, and assigns shall:

1. Cease and desist from
 - (a) Interrogating employees about their concerted activities.
 - (b) Creating the impression that employees' concerted activities are under surveillance.
 - (c) Promulgating overly-broad and discriminatory rules or directives prohibiting employees from "running their mouths" or communicating with third parties about their terms and conditions of employment.
 - (d) Threatening employees with discharge, suspension, cessation of work assignments, and other unspecified reprisals if they engage in protected concerted activi-

(2016); *The H.O.P.E. Program*, 362 NLRB No. 128, slip op. at 2 fn. 1 (2015); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enf'd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

ties or refuse to disclose, in response to unlawful interrogation, that they engaged in concerted activities.

(e) Ceasing assigning work to employees, suspending, or discharging employees because they engage in protected concerted activities, and to discourage employees from engaging in these activities.

(f) Conditioning the assignment of future work to employees on their cessation of concerted activities.

(g) Reneging on purchase agreements or failing to reimburse employees for money already paid pursuant to a purchase agreement, because they engage in concerted activities and to discourage employees from engaging in concerted activities.

(h) Failing to return employees' personal property because they engage in concerted activities and to discourage employees from engaging in concerted activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overly broad and discriminatory rules or directives prohibiting employees from "running their mouths" or from communicating with third parties about their terms and conditions of employment.

(b) Rescind the threat to discharge, suspend, cease assigning employees work, or administer other unspecified reprisals because they engaged in concerted activities or because they refuse to disclose that they engaged in concerted activities in response to unlawful interrogation.

(c) Rescind the threat not to assign employees future work unless they cease engaging in concerted activities.

(d) Within 14 days from the date of this Order, offer Roy Evaimalo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Roy Evaimalo whole for any loss of earnings or benefits he may have suffered as a result of the unlawful refusal to assign him work, his suspension, and his discharge, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(f) Compensate Roy Evaimalo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal

to assign work to Roy Evaimalo, his suspension, and his discharge, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

(h) At the option of Roy Evaimalo, either reinstate the agreement to allow Evaimalo to purchase a work truck or reimburse Evaimalo for the \$2000 that he already paid toward the purchase price, with interest.

(i) Return to Roy Evaimalo personal belongings, tools, and property that were left in his work truck at the time of his discharge or reimburse Evaimalo for the cost of replacing those belongings, with interest.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facility in Tucson, Arizona, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2016.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. May 12, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about their concerted activities.

WE WILL NOT create the impression that employees' concerted activities are under surveillance.

WE WILL NOT promulgate overly-broad and discriminatory rules or directives prohibiting employees from "running their mouths" or communicating with third parties about their terms and conditions of employment.

WE WILL NOT threaten employees with discharge, suspension, cessation of work assignments, and other unspecified reprisals if they engage in protected concerted activities or refuse to disclose, in response to unlawful interrogation, that they engaged in concerted activities.

WE WILL NOT cease assigning work to employees, suspend, or discharge employees because they engage in

protected concerted activities, and to discourage employees from engaging in these activities.

WE WILL NOT condition the assignment of future work to employees on their cessation of concerted activities.

WE WILL NOT renege on purchase agreements or fail to reimburse employees for money already paid pursuant to a purchase agreement, because they engage in concerted activities and to discourage employees from engaging in concerted activities.

WE WILL NOT fail to return employees' personal property because they engage in concerted activities and to discourage employees from engaging in concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the overly broad and discriminatory rules or directives prohibiting employees from "running their mouths" or from communicating with third parties about their terms and conditions of employment.

WE WILL rescind the threat to discharge, suspend, cease assigning employees work, or administer other unspecified reprisals because they engaged in concerted activities or because they refuse to disclose that they engaged in concerted activities in response to unlawful interrogation.

WE WILL rescind the threat not to assign employees future work unless they cease engaging in concerted activities.

WE WILL, within 14 days from the date of the Board's Order, offer Roy Evaimalo full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make employee Roy Evaimalo whole for any loss of earnings and other benefits suffered as a result of the unlawful refusal to assign him work, his suspension, and his discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Roy Evaimalo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to assign work to Roy Evaimalo, his suspension, and his discharge and WE WILL, within 3 days thereafter, notify him in writing that this has been done

and that the unlawful actions will not be used against him in any way.

WE WILL, at the option of Roy Evaimalo, either reinstate the agreement to allow Evaimalo to purchase a work truck or reimburse Evaimalo for the \$2000 that he already paid toward the purchase price, with interest.

WE WILL return to Roy Evaimalo the personal belongings, tools, and property that were left in his work truck at the time of his discharge or reimburse Evaimalo for the cost of replacing those belongings, with interest.

OMEGA CONSTRUCTION SERVICES, LLC

The Board's decision can be found at www.nlr.gov/case/28-CA-188536 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

